National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

October 24, 1989

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Carpenters Union, Local 745 (Ohbayashi Hawaii Corporation) Cases 37-CE-13 and 37-CC-277

584-5014, 584-5028, 240-3367-8375

This case was submitted for advice as to whether Bill Johnson's Restaurant, Inc. v. NLRB 1 precludes issuance of an 8(e) and 8(b)(4)(A) complaint based on a union's attempt to obtain and enforce an arbitration award applying a union-signatory subcontracting clause in a manner violative of 8(e).

BACKROUND AND FACTS

The facts are essentially as set forth in the Region's memorandum dated May 31, 1989 and an Advice Memorandum dated June 30, 1989. In the Advice Memorandum, we authorized issuance of an 8(e) complaint against the Union based upon the bilateral affirmation (by arbitration award) of an unlawful application of the union-signatory subcontracting clause to O.H.C., an enterprise which is not in the construction industry.

The Region has resubmitted the case for a determination as to whether Bill Johnson's Restaurant precludes issuance of a Section 8(e) complaint. The argument for dismissal is that the Union's grievance was based on a reasonable assertion that the contract signatory (Ohbayashi Corporation, the Employer's parent company) and O.H.C. are a single employer.

On June 6, 1989, the Union filed a Motion for Confirmation of Arbitration Award in federal district court. This motion is pending, along with the Employer's motion to vacate the arbitration decision. The current charge alleges that the Union further violated Sections 8(e) and 8(b)(4)(A) by filing its motion for confirmation of the arbitration award.

ACTION

We conclude that the Region should issue a Section 8(e) complaint regarding the unlawful arbitration award and the Union's attempt to enforce that award. The Region should not proceed as to the grievance leading up to the award and should not proceed on the 8(b)(4)(A) charge.

In Bill Johnson's Restaurant, the Supreme Court held that the Board cannot enjoin, as an unfair labor practice, an employer's retaliatory state court lawsuit if the suit is premised on an ostensibly legitimate claim. 2 That is, "although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis." 3 However, the Court expressly noted in footnote 5 of its opinion that it was not altering the Board's power to enjoin any suit that "has an objective that is illegal under federal law." 4

With regard to the filing of contractual grievances and Section 301 suits, the Board has interpreted Bill Johnson's to mean that where the resolution of grievance issues in a particular manner could result in a lawful application of the contract, and the union's assertions regarding these issues have a "reasonable basis," the Board must defer to the union's right to grieve such matters and decline to find the grievance an unfair labor practice. 5 On the other hand, where the union's assertions are not reasonably based, or where the contract, as construed by the union, would violate the Act, Bill Johnson's does not prevent the Board from finding a violation. 6

Applying these principles to the instant case, we conclude that the Union's processing of the grievance was not unlawful. Concededly, we have found that O.H.C. and Ohbayashi do not constitute a single employer. Therefore, even if Ohbayashi is in

the construction industry, O.H.C. does not partake of Ohbayashi's status as a construction industry employer. However, these matters are not free from doubt, and a contrary view would be reasonable. Further, if this contrary view were accepted, there would be no 8(e) violation, for O.H.C./Ohbayashi would be in the construction industry.7 Since the Union's position had a reasonable basis, and since that position, if correct, would have resulted in a proviso-protected agreement, the grievance cannot be condemned as an unfair labor practice.

However, once the arbitral award was handed down, the award itself was an unfair labor practice. As set forth in the prior memorandum, the award applied the union-signatory clause to an employer (O.H.C.) who was not in fact in the construction industry.8 In Long's Drug 9 and Church's Fried Chicken 10, the Board held that construction site owners and real estate developers are not in the construction industry if they relinquish all control of construction work and job site labor relations to other entities; the "potential" for job site control is not sufficient to bring employers within the proviso. As discussed in the prior Advice Memorandum, O.H.C. does not have control over any construction industry work. Rather, at all sites owned or developed by these employers, it has hired general contractors with full responsibility for overseeing the work and establishing and monitoring subcontracts. This was the situation at the Kaanapali jobsite involved in the instant cases; O.H.C. relinquished all control over job site work and the numerous subcontracts to JDH, the general contractor, and only indirectly monitored performance of the JDH contract through periodic meetings with the architect.

Thus, the award was a Section 8(e) violation. The suit to enforce the award was also a Section 8(e) violation. As noted supra, the Supreme Court has held that a suit can be condemned as an unfair labor practice if it "has an objective that is illegal under federal law." In support of this view, the Court cited cases where unions had sued to enforce unlawful fines. That is, in each case, the fine was an unfair labor practice, and the suit was for the objective of enforcing that unfair labor practice. Thus, the suit had an unlawful objective. Similarly, in the instant case, the arbitration award constituted an unfair labor practice. By applying a union-signatory clause to an employer who is not in the construction industry, the arbitration award constituted a Section 8(e) agreement that was not protected by the 8(e) proviso. The suit to enforce the award was a suit to enforce this unfair labor practice, and thus was unlawful under footnote 5 of Bill Johnson's. The Board can enjoin the prosecution of lawsuits to obtain such objectives without any inquiry into the reasonableness of their legal or factual bases.11

Finally, we would not attack the suit as a Section 8(b)(4)(A) violation. Although the suit is an effort to enforce a Section 8(e) agreement, it is problematical to say that a peaceful resort to court constitutes restraint or coercion. 12 We need not resolve this issue. The 8(e) allegation, authorized above, will yield a remedial order that the union cease and desist from enforcing the 8(e) agreement by any means, including the suit to enforce the agreement. A Section 8(b)(4)(A) allegation would not add materially to this remedy.

[FOIA EXEMPTIONS 2 & 5] Accordingly, the Region should issue an 8(e) complaint and[FOIA EXEMPTIONS 2 & 5], absent settlement.

H.J.D.

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1 461 U.S. 731 (1983)

2 461 U.S. at 743, 746.

3 461 U.S. at 749.

4 461 U.S. at 737, n. 5.

5 See Teamsters Local 483 (Ida Cal Freight Lines, Inc.), 289 NLRB No. 120 (1988) (union's Section 301 suit contended that certain truck drivers were statutory employees rather than independent contractors; although the Board concluded that the drivers were independent contractors, it declined to find the suit violative of Section 8(b)(4)(A) because the union had a reasonable basis for asserting that the operators were employees); IBEW Local 532 (Brink Construction Co.), 291 NLRB No. 69 (1988); Local No. 7, International Longshoreman's Union (Georgia-Pacific), 291 NLRB No. 13 (1988).

6 See International Union of Elevator Constructors, Local No. 3 (Long Elevator and Machine Co., Inc.), 289 NLRB No. 132 (1988).

7 Compare Long Elevator, where the position taken by the union, if accepted, would have been unlawful under 8(e).

8 Although the union had a reasonable argument to the contrary, the argument, in fact, is not meritorious.

9 United Brotherhood of Carpenters and Joiners, Local 743 (Long's Drug Stores, Inc.), 278 NLRB 440 (1986).

10 L.A. Building & Construction Trades Council (Church's Fried Chicken, Inc.), 183 NLRB 1032 (1970).

11 See Bill Johnson's Restaurant, supra, at n. 5; American Pacific Concrete Pipe Co., 292 NLRB No. 133 (1989); General Counsel's Motion for Reconsideration of Board decision in Giant Food Stores, Inc., 295 NLRB No. 38 (1989).

12 Although Long Elevator would support such a view, we noted supra that Long is distinguishable.